6 | 7 | 8 | MONTANA FIRST JUDICIAL DISTRICT COURT

MIKE WHEAT, JON TESTER, and KEN HANSEN,	Cause No. BDV-2003-601
Plaintiffs,	ORDER
V.	
BOB BROWN, in his official capacity as Secretary of State of the State of Montana,	
Defendant.	

LEWIS AND CLARK COUNTY

18 Author's Note

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This case was argued before the Court on Monday, December 15, 2003. The case itself was filed on November 3, 2003. At the request of the parties, this Court has issued an expeditious ruling. Due to time constraints that will be mentioned in this decision, the parties are eager to get this matter to the Montana Supreme Court, so this Court has prioritized this particular issue. In so doing, the Court does not wish to say that any party's argument was not well reasoned. The Court found the briefs to be very well written and the positions of all parties well taken.

In addition, the Court would apologize in advance if any grammatical or citation mistake is discovered herein. If such be the case, any mistake hopefully would be found to be the result of the quick processing of this motion and not any defect of the author.

Standard

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This case is before the Court on motions for summary judgment filed by both parties. There is nothing that appears to this Court to create a factual dispute either from the parties' briefs or from the oral argument heard by the Court. Indeed, it would appear that the parties agree on all of the facts, and the only issues are legal.

Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. Minnie v. City of Roundup, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993). The burden then shifts to the party opposing the motion to show, by more than mere denial and speculation, that there are genuine issues for trial. Sunset Point P'ship v. Stuc-O-Flex Int'l, 1998 MT 42, ¶ 13, 287 Mont. 388, ¶ 13, 954 P.2d 1156, ¶ 13. The party opposing the summary judgment is entitled to have any inferences drawn from the factual record resolved in his or her favor. Rule 56(c), M.R.Civ.P.

Summary judgment motions encourage judicial economy through the elimination of unnecessary trial, delay and expense. <u>Bonawitz v. Bourke</u>, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977). However, summary judgment is not to be utilized to deny the parties an opportunity to try their cases before a jury. <u>Brohman v. State</u>, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988). "Summary judgment is an extreme remedy and should never

be substituted for a trial if a material fact controversy exists." Clark v. Eagle Sys., Inc., 279 Mont. 279, 283, 927 P.2d 995, 997 (1996) (citations omitted). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. Rogers v. Swingley, 206 Mont. 306, 670 P.2d 1386 (1983); Cheyenne W. Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978); Kober v. Stewart, 148 Mont. 117, 122, 417 P.2d 476, 479 (1966).

Factual Statement

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Plaintiffs Mike Wheat, Jon Tester and Ken Hansen are members of the Montana Senate who were elected to office in 2002, for terms to run from January 1, 2003, through December 31, 2005.

Defendant Bob Brown is Secretary of State for the State of Montana. His primary responsibility is maintaining the official public records for the State of Montana and for conducting elections.

The complaint in this case arises out of the 2003 redistricting of the State of Montana into 100 house districts and 50 senate districts for election of the state legislature. Specifically, the case below involves the assignment of "holdover senators" who were elected under the old districting system, but need to be assigned to districts under a new system.

Montana's legislative districts are determined after each federal census. A Districting and Apportionment Commission (Commission) is appointed according to the terms of Article V, Section 14, of the Montana Constitution. Once the Commission is formed, it must prepare a plan for redistricting and submit that plan to the legislature during its regular session. The legislature then has 30 days to make recommendations and return the plan to the Commission. Within 30 days after receiving the legislature's recommendations, the Commission must file its plan with the Secretary of State, and the plan becomes law.

A federal census was conducted in 2000. As required by the Montana Constitution, the legislative leadership appointed four members to the Commission, and the fifth member was appointed by the Montana Supreme Court. The Commission submitted its final plan to the Secretary of State on February 5, 2003. The Commission's submission to the Secretary of State included assignments of "holdover senators" to the newly re-drawn senate districts.

The term "holdover senator" refers to those state senators who have served two years of their four-year terms at the time of redistricting; and are, therefore, "not required to seek election at the general election held immediately following the districting plan becoming law. Section 5-1-116, MCA. After each 10-year redistricting, 25 holdover senators must be assigned to newly re-drawn senate districts, where the holdover senators serve the final two years of their terms.

After the Commission submitted its plan, along with proposed holdover senator assignments, to the legislature, the legislature passed Section 5-1-116, MCA (also known as Senate Bill 258). Section 5-1-116, MCA provides in relevant part that "[i]n the session in which the legislative redistricting plan is submitted to the legislature for recommendations, the legislature, by joint resolution, shall assign holdover senators to districts for the remainder of those senators' terms." The statute further provides that "[t]he districting and apportionment commission may not assign holdover senators to districts for the remainder of those senators' terms."

On April 9, 2003, Governor Martz signed into law Senate Bill 445, which provides in relevant part that "Section 3 of the districting and apportionment plan of 2003, the transition provision assigning holdover senators to new legislative districts, is repealed." On April 20, 2003, the legislature filed with the Secretary of State Senate Joint Resolution 23, a joint resolution that had been approved by both houses, assigning holdover senators

to the newly drawn senate districts.

The Commission's holdover assignments differ from the legislature's with respect to 6 of the 25 holdover senators, affecting 11 districts. The differences are as follows:

Name of Senator	Commission Assignment	<u>Legislature's Assignment</u>
Jon Tester	SD 15	SD 17
Ken Hansen	SD 17	SD 16
Brent Cromley	SD 25	SD 26
John Bohlinger	SD 28	SD 27
Mike Wheat	SD 32	SD 33
Sherm Anderson	SD 42	SD 43

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Commencing January 26, 2004, candidates for seats in the Montana Senate may file a declaration for nomination to run in the primary election. March 25, 2004, is the last day candidates for seats in the Montana Senate may file a declaration for nomination to run in the primary election, and the statewide primary for the Montana Senate is June 8, 2004.

Summary

The question this Court will address is whether the assignment of holdover senators is part of the redistricting process to be handled by the Commission or whether it is an issue to be addressed by the legislature.

This Court holds that the issue of holdover senators and their assignment is part and parcel of the redistricting process. Such being the case, this function is constitutionally assigned to the Commission, and Senate Bill 258, Senate Bill 445 and Joint Resolution 23 are all unconstitutional insofar as they attempt to assign the power of the Commission to the legislature.

Standard of Review

In addressing this issue, the Court is mindful of well settled rules of law.

One pertinent rule provides that in addressing a constitutional challenge to any statute, the statute is presumed constitutional, and the challenging party has the burden of establishing the statute's unconstitutionality. Harper v. Greely, 234 Mont. 259, 269, 763 P.2d 650, 656 (1988). If a doubt exists with respect to a finding of unconstitutionality, it must be resolved in favor of the legislation. Id. Another rule provides that the legislature can expand, but may not restrict rights guaranteed by the state or federal constitution. See Marbury v. Madison, 5 U.S. 137 (1803); Noll v. City of Bozeman, 166 Mont 504, 506, 534 P.2d 880, 881 (1975); Shroyer v. Sokol, 550 P.2d 309, 311 (Colo. 1976). Finally, in interpreting provisions of the constitution, the Court is constrained and guided by various rules of construction applicable to interpreting legislation. Great Falls Tribune Co. v. Great Falls Pub. Sch. Bd. of Trustees, 255 Mont. 125, 128-29, 841 P.2d 502, 504 (1992). Accordingly, the Court must construe Article V, Section 14, of the Montana Constitution according to the plain meaning of the language therein. State ex rel. Woodahl v. Dist. Ct., 162 Mont. 283, 292, 511 P.2d 318, 323 (1973). When the language of the provision is plain, unambiguous, direct and certain, the provision speaks for itself and there is nothing left for the court to construe. Hammill v. Young, 168 Mont. 81, 85-86, 540 P.2d 971, 974

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(1975).

The Commission is assigned the task of redistricting and reapportioning the state into legislative districts. The history of the constitution shows that the purpose of the drafters was to "[b]ypass the Legislature from this point on." (Statement of Delegate Skari, Mont. Const. Conv. Tr. Vol. IX at 682.)

The idea that the assignment of holdover senators was part and parcel of the redistricting process is not a novel one. The first federal census after the 1972 Constitutional Convention occurred in 1980. Another census occurred in 1990. After both of those censuses, the Commission, as it then existed, included assignments for holdover

senators as part of its plan. These plans were filed, became law and were not disputed by anyone.

In response to the 1980 census, an Attorney General's opinion was issued. In pertinent part, the Attorney General stated:

The reapportionment plan is the responsibility of the Montana Districting and Apportionment Commission. The Commission has the inherent authority under the Montana Constitution, article V, section 14 to do what is necessary to implement a plan that complies with the State's laws. See Cargo v. Paulus, 635 P.2d 367 (1981). This means that the Commission must not only redraw district boundaries, but also designate the election dates for the new districts. Various states have handled the details of reapportionment differently with respect to how holdover senators fit into the reapportionment plan. In Montana, these details are the responsibility of the Districting and Apportionment Commission.

40 Mont. Op. Att'y Gen. 2 (1983).

The closest case that the parties have cited to the Court is the Oregon case of Cargo v. Paulus, 635 P.2d 367 (Or. 1981). In Oregon, at the time of the Cargo case, the Oregon constitution did not specifically address the assignment of holdover senators. However, in holding that the assignment of holdover senators is an inherent part of redistricting, the Oregon Supreme Court stated:

The Secretary is not expressly authorized to assign Senators. Under Article IV, \S 6(2)(c), however, in which the Supreme Court is authorized "to direct the Secretary of State" to draft a reapportionment of the Senators and Representatives in compliance with subsection (1), the unavoidable inference is that the Secretary is authorized to do what is necessary to draft a reapportionment plan that complies with Article IV, \S 6(1)...

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Cargo, 635 P.2d at 369.

Importing the rationale of the Oregon Supreme Court in <u>Cargo</u> to Montana supports Plaintiffs' position. The Commission is assigned by the Montana Constitution with the job of redistricting; it must follow that the Commission is also delegated the task of assigning holdover senators as part and parcel of doing what is necessary to draft the

redistricting plan.

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The Court would also agree with Plaintiffs' counsel that the whole idea of "holdover senators" is part and parcel of the redistricting process. Indeed, the words have no practical meaning outside of the context of the redistricting that is constitutionally assigned to the Commission.

Defendant suggests that the activities of the legislature are pursuant to its plenary powers pursuant to Article V, Section 1, of the Montana Constitution. However, a similar defense was recently rejected by District Court Judge Dorothy McCarter in Brown v. Mont. Districting & Apportionment Comm'n, No. ADV-2003-72 (D. Mont. July 2, 2003). At page 6 of that decision, Judge McCarter found that the language of Article V, Section 14, of the Montana Constitution does not indicate an intent to involve the legislature in the redistricting process other than the selection of the commissioners and its recommendations to the Commission. Such being the case, Judge McCarter found the constitutional provision to be self-executing without any need for assistance from the legislature. Id. at ¶ 15. Although Judge McCarter's decision is not binding on this Court, it is persuasive, and this Court adopts that same rationale.

Next, Defendant suggests that the legislature's activities in this case are necessary to ensure the purity of elections pursuant to Article IV, Section 3, of the Montana Constitution. However, Judge McCarter was faced with the identical issue in Brown. Judge McCarter held that the purity section relied on by the defendant in that case, as is the case here, pertains to the mechanics of elections and not to the legislative redistricting process. Id. at ¶ 18.

Therefore, based on the above, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Senate Bill 258, Senate Bill 445 and Joint Resolution 23 enacted by the 2003 Montana Legislature violate Article V, Section 14, of the Montana Constitution by

1	impermissibly injecting the legislature into the redistricting and reapportionment duties	
2	assigned by the constitution to the Montana Districting and Apportionment Commission.	
3	To the extent that any of the just mentioned senate bills or joint resolution attempt to assign	
4	holdover senators pursuant to the 2000 federal census, they are hereby declared	
5	unconstitutional and of no force and effect.	
6	Further, the Montana Secretary of State is hereby ORDERED to give effect	
7	to the plan filed by the Commission, including its assignments of holdover senators.	
8	DATED this day of January, 2004.	
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10	JEFFREY M. SHERLOCK	
11	District Court Judge	
12	pc. Peter Michael Meloy/Jennifer S. Hendricks Robert Cameron	
13	Robert Cameron	
14	T/JMS/wheat v. brown order.wpd	
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